

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 068596/2026

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	
21/08/2026	SIGNATURE
DATE	

In the matter between:

**BAHURUTSHE BOO MANYANA TRADITIONAL
COMMUNITY**

Applicant/Respondent

On Appeal

and

MARICO CHROME CORPORATION (PTY) LTD

First Respondent/Appellant

On Appeal

THEODOR WILHELM VAN DEN HEEVER N.O.

Second Respondent/Appellant

KGASHANE CHRISTOPHER MONYELA N.O.

Third Respondent/Appellant

OLCKERS CHOPOLOGE KOIKANYANG N.O.

Fourth Respondent/Appellant

SAMANCOR CHROME LIMITED

Fifth Respondent

VEREENIGING REFRACTORIES (PTY) LTD

Sixth Respondent

COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

Seventh Respondent

MASTER OF THE HIGH COURT

Eight Respondent

DIRECTOR-GENERAL: DEPARTMENT OF

MINERAL RESOURCES

Ninth Respondent

JUDGMENT

MKHABELA J (TEFFO J and LUKHAIMANE AJ CONCURRING)

Introduction

[1] Does a scheme¹ of arrangement concluded between provisional liquidators and the company's creditors which was subsequently sanctioned by a Court survive the discharge of the provisional order? Despite the fact that we are dealing with a section 18(4) appeal, the question whether the scheme of arrangement entitles the Receivers to continue to run a company features prominently in this dispute.

Background

[2] The parties are described in the previous two judgments by my brother Millar J. For convenience, I will endorse the nomenclature by the *court a quo* of referring to the applicant as the Community, the second to fourth respondents as Receivers and the first respondent as Marico.

¹ Schemes of arrangement are provided for in section 311 of Companies Act. The section provides as follows: "311 compromise and arrangements between the company, its members and creditors (1) Where any compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or any creditor or member of the company or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the Court may direct".

[3] The facts are largely common cause and are aptly captured in the main judgment of Millar J as follows: On 10 May 2016, Marico was placed under provisional liquidation, and the Receivers were appointed as liquidators.

[4] Subsequent to Marico being placed under provisional liquidation, the Receivers concluded a scheme of arrangement. The Receivers were provisional liquidators at the time, sought to obtain an order sanctioning the scheme of arrangement in terms of section 155 of the Companies Act². This order was granted by this Court on 9 June 2020.

[5] The order that sanctioned the scheme of arrangement is reproduced in the main judgment of Millar J³. It is not necessary to regurgitate it in this judgment. Suffice to state that the scheme of arrangement was entered into between the concurrent creditors of Marico.

[6] The next significant event that followed was the discharge of the provisional order which was granted by this very Court on 22 September 2023.

[7] Similarly, just like the order sanctioning the scheme of arrangement, the order discharging the provisional order is quoted by Millar J in his main judgment.⁴ For the purpose of this judgment, it is necessary to record that the discharge of the provisional order was silent on the question whether the scheme of arrangement will survive the discharge of the provisional order.

The issue before Millar J in his main judgment

[8] The question that arose crisply for determination before Millar J was whether there was any role for the Receivers to run Marico beyond the discharge of the provisional liquidation order.

[9] Millar J phrased the question as follows:

² 71 of 2008.

³ At para 5 of Millar J's main judgment.

⁴ Above n 3.

“Does the scheme contemplate a role for the Receivers after the discharge of the provisional liquidation order?”

[10] As reflected in Millar J’s main judgment,⁵ the Community contended that the scheme of arrangement came to an end and did not survive beyond the discharge of the provisional order.

[11] On the contrary, the Receivers submitted that the scheme of arrangement conferred upon them the authority to retain and control Marico in their capacities as Receivers, notwithstanding that Marico is no longer under any liquidation.

[12] Having scrutinized the terms of the scheme of arrangement, concomitant with the applicable law and authorities, Millar J concluded that there was no role for the Receivers in the affairs of Marico after the provisional order had been discharged.

[13] Millar J found that unlike United Kingdom’s Insolvency law, in our law the terms Receivers and Receivership are not explicitly defined in our Insolvency Act, nor the Companies Act.

[14] In these circumstances, Millar J found in favour of the Community and granted the substantive relief to the effect that the implementation of the scheme of arrangement in the hands of the Receivers come to an end after the discharge of the provisional order. The effect of the order is that the management and control of Marico should be revested in its board of directors.

The section 18(3) judgment

[15] Pursuant to the Receivers filing their application for leave to appeal Millar J’s main judgment, the Community filed an application for leave to execute pending any determination for leave to appeal or appeal as the case maybe.

[16] In his section 18(3) judgment, Millar J was alive to the fact that the Community was required to demonstrate and prove three requirements. Firstly, the existence of

⁵ Millar J’s judgment dated 28 May 2026.

exceptional circumstances which justify the execution of the order pending any appeal, secondly, proof that the Community will suffer irreparable harm, and thirdly that the Receivers will not suffer irreparable harm if the order is executed notwithstanding any appeal or leave to appeal.

Exceptional Circumstances

[17] Millar J found that the fact that the financial statements of Marico misstated that the company was still in liquidation when the provisional order was discharged constituted sufficient exceptional circumstances on its own ground.

[18] Moreover, Millar J relied on the authority of *Incubeta Holdings (pty) Ltd v Ellis*⁶ to the effect that if the judgment is not put into operation pending any appeal, the judgment in favour of the Community would be nothing more than the “vacuous gesture”.⁷

Irreparable harm to the Community

[19] Millar J agreed with the Community that it would suffer irreparable harm if the judgment is not executed pending any appeal. His reasoning in reaching this conclusion was fortified *inter alia* by the fact that the irreparable harm was caused by the continuation of unlawful governance of Marico by the Receivers, notwithstanding the discharge of the provisional order.

[20] The second ground of irreparable harm that the Community asserted, and which found favour with Millar J was that the Receivers have

“operated the business of Marico since their discharge as provisional liquidators for the sole benefit of the shareholders who still have outstanding loans to the exclusion of the Community”.

⁶ *Incubeta Holdings (pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at paras 27-28.

⁷ At para 18 of the Millar J's section 18(3) judgment.

Irreparable harm to the Receivers

[21] In respect of this enquiry, Millar J appreciated that the envisaged harm to the Receivers must arise out of the implementation of the order. He relied on the Supreme Court of Appeal case of *Ntlemeza v Helen Suzman Foundation*⁸ in this regard.

[22] Millar J rejected the Receivers' assertion that there would be disruption to operations of the company if the order in the main judgment were to be executed. He held that the Receivers as professionals are required to act in good faith in facilitating the handing over of Marico to its board of directors. Hence, there could be no room for any irreparable harm to the Receivers since they are not Marico. They are service providers who are paid for the services that they render.

[23] Millar J then concluded as follows in respect of irreparable harm to the Receivers:

"I also find that the Receivers have failed to establish that they will suffer irreparable harm if the order is not granted".

The appeal before this Court in terms of section 18(4)(ii)

[24] It is common cause that Millar J dismissed the Receivers' application for leave to appeal. However, they have subsequently applied for special leave in the Supreme Court of Appeal against the main judgment.

[25] The current appeal before us is only confined solely to whether Millar J was correct in granting the execution and implementation of his judgment as envisaged by section 18(3) of the Superior Courts Act.⁹

[26] Before us, the Receivers attacked Millar J's execution order on various grounds; the view I adopt is that it is not necessary to exhaustively deal with all these grounds. The Receiver's written heads of argument do not attempt to unequivocally state the grounds of appeal succinctly in a sequential format.

⁸ *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) at para 28.

⁹ Act 10 of 2013.

[27] The bulk of the written submissions are directed against the merits of Millar J's main judgment rather than sharply focusing on why the execution of the order was wrongly granted. No attempt in the Receivers' heads is made to address whether the Community has discharged its onus of proof by providing the jurisdictional requirements of section 18(3) of the Act.

[28] Be that as it may, one can discern the following grounds that the Receivers are relying on to attack the execution order. Firstly, they claim that the *Court a quo* erred in finding that the Community has established exceptional circumstances warranting the execution of the order. They assert that there are no exceptional circumstances because *inter alia*, the Community has no locus standi as it is neither a shareholder nor a holder of a mining right.

[29] Moreover, the Community's case for exceptionality is squarely predicated on the correctness of the order.

[30] Secondly, in respect of irreparable harm, the Receivers asserted the same contention, namely that the Community's irreparable harm is also premised on the correctness of the Court's order.

[31] The Receivers submitted further that the Community had failed to demonstrate any harm, "definitely no irreparable harm". The purported irreparable harm is premised on the assertion that the Community is a shareholder when it is not.

[32] Thirdly, the Receivers contended that if they were to surrender the control of the business to the board of directors of Marico, "it will cause major disruption in the conduct of the business".

[33] Fourthly, they claim Millar J was wrong in his conclusion that the scheme had come to an end upon the discharge of the provisional liquidation order.

[34] Notwithstanding that the Receivers' written heads do not succinctly canvass the grounds of appeal against the execution order; the Receivers' notice of appeal does

so and asserts that the three jurisdictional requirements to warrant an execution order had not been established by the Community.

The Community's submission in its defence of the execution order.

[35] The Community aligned itself with the reasoning of Millar J and contended that it had established all the three requirements of section 18(3) and that the execution order is warranted. I do not deem it necessary to burden this judgment by repeating the alluded three requirements since they have already been referred in the preceding paragraphs.

The issue before us

[36] The crisp issue before us is whether the *Court a quo* was correct in granting the Community the right to execute pending, the application for special leave to the Supreme Court of Appeal given the fact that Millar J has already dismissed the Receivers' application for leave to appeal his main judgment.

Evaluation

[37] The gravamen of Millar J's reasoning in finding that there are exceptional circumstances warranting the execution of his order is that Marico was reflected as a company that was still in liquidation when the provisional order had already been discharged. He found that the misstatement of the company's current status constituted exceptional circumstances on this ground alone.

[38] The Receivers had no qualms with that finding other than to state that it was a mistake. In the current appeal before us the Receivers have not submitted that Millar J was wrong on this aspect.

[39] In respect of the requirement that the Community must demonstrate that it would suffer irreparable harm, Millar J's finding was that there is no provision in our company law allowing a company that is no longer in liquidation to be run by Receivers. His reasons were predicated on the premise that once a company is no longer in liquidation, the management and control of such company revert to its board of directors.

[40] Before us, the Receivers have not provided any authority statutorily or through case law supporting their assertion that they have authority to run the company as Receivers. Millar J examined the compromise and found nothing that envisaged the authority of the Receivers to run Marico post the discharge of the provisional liquidation order.

[41] In the circumstances, Millar J's finding that the Community has established that it would suffer irreparable harm cannot be flouted and remains sacrosanct on the facts before us.

[42] On the question that the Receivers would suffer irreparable harm, Millar J held as follows:

"I also find that the Receivers have failed to establish that they will suffer irreparable harm."

In our respectful view, Millar J erred to the extent that he shifted the onus of proving on a balance of probabilities that the Receivers were required to establish that they would suffer irreparable harm if the execution order is granted. Section 18(3) is unambiguous that it is incumbent on the Community to prove that the Receivers will not suffer irreparable harm if the execution order is granted.

[43] The Receivers have not criticised Millar J's error as alluded above. Nothing turns on the error since the cumulative reasoning of Millar J concomitant with the undisputed facts unequivocally points to a conclusion that there is no irreparable harm to the Receivers whatsoever.

[44] The purported harm that the Receivers postulated pertains to Marico and not the Receivers in their personal capacities. The thesis that the Receivers seek to advance on behalf of the company is that the scheme of arrangement can only be implemented by them. This argument is specious; it adopts a pessimistic view on how the board will run the company if its management is revested to it.

[45] The board members have a fiduciary duty not to run the company recklessly and any aggrieved creditor is not without a remedy if the board were to breach its

fiduciary duties.¹⁰ Section 424 of the Companies Act allows a Court to hold directors, managers or any other individuals personally and unlimitedly liable for a company's debts if they knowingly took part in carrying on the business recklessly or with intent to defraud creditors.¹¹

[46] It is worth reiterating that the conclusion that the Community has established that the Receivers will not suffer any irreparable harm if the execution is granted cannot be disturbed and is borne by the facts.

[47] For all these reasons the appeal is susceptible for a dismissal. What is left is the issue of costs. The Community as applicants in the section 18(3) application and respondents in the current appeal have been successful, there is accordingly no reason why the Community should not be granted costs.

[48] Order

1. The appeal in terms of section 18(4)(ii) to this Court sitting as the next highest Court is dismissed with costs on scale B.
2. The second to fourth respondents/Appellants in this matter are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.



MKHABELA J
JUDGE OF THE HIGH COURT
PRETORIA

¹⁰ *Philotex(Pty) Ltd and Another v Snyman and Others* 1998 (2) SA 138 SCA at para142 C-J.

¹¹ Section 424 of the Companies Act 61 of 1973. Though the 1973 Act was largely replaced, section 424 remains active specifically during company liquidation and winding up.

I AGREE




LUKHAIMANE AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I AGREE
AND IT IS SO ORDERED




TEFFO J
JUDGE OF THE HIGH COURT
PRETORIA

For the 1st to 4th Appellants:

Adv Theron SC

Instructed by:

De Vries Inc.

For the Respondent:

Adv Minne
Adv Makoanyana

Instructed by:

Thomson Wilksens Inc.

Date of Hearing: 23 July 2026

Date of the judgment: 21 August 2026